

Stephen H.M. Bloch #7813  
Tiffany Bartz # 12324  
SOUTHERN UTAH WILDERNESS ALLIANCE  
425 East 100 South  
Salt Lake City, UT 84111  
Telephone: (801) 486-3161

Walton Morris, *pro hac vice*  
MORRIS LAW OFFICE, P.C.  
1901 Pheasant Lane  
Charlottesville, VA 22901  
Telephone (434) 293-6616

Sharon Buccino, *pro hac vice*  
NATURAL RESOURCES DEFENSE COUNCIL  
1200 New York Ave., NW, Suite 400  
Washington, DC 20005  
Telephone: (202) 289-6868

**FILED**

**OCT 14 2010**

**SECRETARY, BOARD OF  
OIL, GAS & MINING**

**BEFORE THE BOARD OF OIL, GAS AND MINING  
DEPARTMENT OF NATURAL RESOURCES  
STATE OF UTAH**

---

UTAH CHAPTER OF THE SIERRA CLUB,  
et al.,

Petitioners,

Docket No. 2009-019  
Cause No. C/025/0005

DIVISION OF OIL, GAS AND MINING,

Respondent, and

ALTON COAL DEVELOPMENT, LLC, and  
KANE COUNTY, UTAH,

Intervenors-Respondents.

---

**PETITIONERS' OBJECTIONS TO PROPOSED FINDINGS OF FACT  
AND CONCLUSIONS OF LAW**

Pursuant to this Board's August 3, 2010, *Interim Order on Disposition of Claims* ("interim order"), which announced the Board's decision in this proceeding, Utah Chapter of the Sierra Club

(“Sierra Club”), Southern Utah Wilderness Alliance (“SUWA”), Natural Resources Defense Council (“NRDC”), and National Park Conservation Association (“NPCA”)(collectively, “Petitioners”) file the following objections to the proposed findings of fact and conclusions of law submitted by respondent Division of Oil, Gas, and Mining (“the Division”) and intervenor-respondent, Alton Coal Development, LLC (“ACD”).

1. In light of the repeated invocation of deference to agency expertise and scope of review, the proposed final order must at least attach and incorporate by reference the Board’s January 13, 2010, order on those issues, and the final order must delete the suggested but inaccurate characterization of that order. Alternatively, the final order must set forth accurately and in detail the Board’s rulings on the issues addressed in the January 13, 2010, order. Petitioners object to the Board’s January 13, 2010, order to the extent that it rejected their arguments with respect to deference to agency experts or the scope of the Board’s review.

2. Specifically and not by way of limitation, for reasons set forth in Petitioners’ December 29, 2009, brief on the scope of review and deference to agency experts, the proposed findings of fact and conclusions of law invite the Board to commit error by deferring to the Division’s experts in instances where the Board (a) has not expressly concluded that the evidence is in equipoise or (b) has not adequately and particularly explained why the Board concludes that the evidence is in equipoise.

3. The proposed findings of fact and conclusions of law assign the potentially confusing and deceptive designation “PAP” to the complete permit application package as it stood on the day that the Division approved it; all references to this collection of documents and other data should

be to “Division Exhibit 1 [D-1],” in line with the parties’ stipulation during the hearing and the Board’s approval of same.<sup>1</sup>

4. If adopted in the form that the Division and ACD have offered them, the proposed findings of fact would render the Board’s final order insufficient in form, erroneous, and ultimately arbitrary or capricious because such a final order would repeatedly fail to:

- (a) identify with particularity (*e.g.*, by referring to transcript page(s), exhibit numbers, or both) the specific evidence in the record on which the Board has determined to rely;
- (b) acknowledge with similar particularity the specific portions of record that constitute evidence to the contrary, especially (but without limitation) where such evidence consists in whole or in part of the testimony of a Division or ACD witness on cross-examination or during a Rule 30(b)(6) deposition; and
- (c) provide a reasoned explanation why the Board finds the first body of evidence more persuasive than the second.

5. If adopted in the form that the Division and ACD have offered them, the proposed conclusions of law would render the Board’s final order insufficient in form, erroneous, and ultimately arbitrary or capricious because such a final order would repeatedly fail to:

- (a) identify the specific points of law on which the Board has determined to rely;
- (b) acknowledge each specific part of record that constitutes a contention to the contrary (*e.g.*, argument in post-hearing briefing, materials in OSM or Division guidance documents, prior agency interpretations of law, etc.); and
- (c) provide a reasoned explanation why the Board either rejects or declines to address the merits of each contention of law contrary to the Board’s disposition of each issue that the final order resolves.

6. As is evident from a comparison of the proposed findings of fact with (a) the statements of facts contained in Petitioners’ post-hearing briefs and (b) the complete administrative

---

<sup>1</sup> Petitioners identify herein all exhibits entered into the record during the hearing in this matter by their exhibit numbers. For example, Division Exhibit 1 is identified as D-1.

record taken as a whole, the proposed findings of fact are silent, incomplete, inadequate, or erroneous with respect to numerous material issues of fact for which there exists evidence in the complete administrative record, including but not limited to the unlawfully excluded portions of the Division's Rule 30(b)(6) depositions. For example but without limitation, these deficiencies affect the proposed factual findings concerning:

- (a) the route for coal transportation from the proposed mine through the Panguitch National Historic District and that District's status as "adjacent area";<sup>2</sup>
- (b) the scope of the Division's evaluation of cultural resource sites in the "adjacent area" prior to approving ACD's permit application;<sup>3</sup>

---

<sup>2</sup> Proposed factual finding 42 does not include specific material information in the administrative record concerning data from which the number of coal trucks that may be expected to leave the proposed mine daily may be calculated, or the precise route those trucks may be expected or required to take between the proposed mine and Panguitch, or the lack of alternative routes that might avoid the Panguitch National Historic District.

Proposed conclusion of law 108 should also be rejected for it is based on an incorrect factual assumption. The proposed conclusion asserts that the "Division's determination that it was not reasonable to expect impacts to cultural resources in the PHND from the mining operations was not arbitrary or capricious." The record accompanying the Division's permit approval includes no such determination. Rather than analyzing whether the concerns of Panguitch residents were reasonable, the Division referred those concerns to the Department of Transportation. Technical Memorandum from Joe Helfrich (May 29, 2008) [D-18], at 2 ("The town of Panguitch is not considered an adjacent area under the R645-301-411.130 or R645-301-320. The Division will forward comments concerning the potential impacts to the town of Panguitch caused by the influx of coal truck traffic and to streams such as Mammoth and Assay creeks that intersect with the proposed transportation corridor to the Department of Transportation.") The Division did not determine that impacts from truck traffic were unlikely to occur; rather, the Division decided such impacts were not its problem to deal with. *Id.* Moreover, evidence in the record suggests that the State Historic Preservation Office found the concerns about impacts to the Panguitch National Historic District reasonable and expected the Division to address them. Memorandum from Matthew Seddon, Deputy Staff Historic Preservation Officer and Lori Hunsaker, Public Lands Policy Coordination Office to Joe Helfrich, UDOGM, Comments on Alton Coal Cultural Resource Management Plan (CRMP) and Data Recovery Plan (07-1471) (May 6, 2008) at 1 [P-9]. Nonetheless, the Division approved the Coal Hollow mine permit without addressing the impacts to the Panguitch National Historic District from the numerous daily truck trips that would result from the mine.

<sup>3</sup> Proposed factual finding 77 lacks substantial evidence in the record to support it. The proposed finding asserts that "the Division evaluated sites located in the area adjacent to the permit boundary for eligibility and potential adverse effect." This proposed finding ignores the fact that the analysis of eligibility and effect included in Alton's permit application was limited to the permit area. Montgomery Archeological Consultants, Inc. ("MOAC"), *Cultural Resource Inventory of Alton Coal Developments Sink Valley – Alton Amphitheater Project Area* (March 10, 2006)(hereafter "*March 10, 2006 Inventory*"), at 3 (Figure 1) [D-11]. This is the report upon which the Division based its determination of eligibility and effect as documented in its letter to the State Historic Preservation Office on November 2, 2007. Letter from Pamela Grubaugh-Littig, Permit Supervisor to Dr. Matthew Seddon, Deputy State Historic Preservation Officer (Nov. 2, 2007)(hereafter "*November 2, 2007 Request to SHPO*") at 1 [D-12]. According to the report's own terms, "approximately 433 acres were inventoried, all of which are on private

- (c) the scope of the information provided to, and the concurrence of, the Utah State Historic Preservation Officer (“SHPO”);<sup>4</sup>
- (d) acceptance and approval of the permit’s air quality monitoring program by the Division of Air Quality or the capability of that plan to collect “sufficient” data to evaluate the effectiveness of the fugitive dust control practices, or the lack thereof;<sup>5</sup> and
- (e) whether ACD’s application contains a description of how hydrologic monitoring data may be used to determine the impacts of the proposed mine on the hydrologic

---

property.” *March 10, 2006 Inventory* at i [D-11]. The administrative record establishes, without contravention, that the analysis upon which the Division based its determination of eligibility and effect submitted to the SHPO did not extend to any sites located wholly outside the permit boundary. *Id.* at 3 (Figure 1).

<sup>4</sup> No evidence in the record supports proposed finding 81 that the “Division’s determination of potential adverse impacts beyond the permit boundary was . . . based on . . . the SHPO’s concurrence.” Neither the Division nor Alton has identified any evidence that analysis of the effects on sites outside the permit boundary was provided to the SHPO. The information provided to the SHPO for purposes of determination of eligibility and effect was limited to fifteen sites located within the permit area. *November 2, 2007 Request to SHPO*, at 1-2 [D-12]; *March 10, 2006 Inventory* at 3 (Figure 1) [D-11]. Nothing in the Division’s letter to the SHPO regarding determination of eligibility and effect mentions an adjacent area outside the permit area at all. Recognizing this failure following Petitioners’ challenge to the permit, the Division sent a letter to Wilson Martin, State Historic Preservation Officer (“SHPO”), on March 30, 2010, specifically requesting clarification that the SHPO confirm that there will be no adverse effects “within the proposed permit area or adjacent areas.” The SHPO declined to provide such confirmation despite the explicit request to do so. Letter from Lori Hunsaker, Deputy State Historic Preservation Officer, to Daron Haddock, DOGM (April 26, 2010) [D-22]. The SHPO did not provide concurrence on a no adverse effect determination outside the permit boundary. *Id.* Any finding by the Board that suggests otherwise conflicts with the undeniable evidence in the record.

<sup>5</sup> No evidence in the record supports proposed factual finding number 120 that the Utah Division of Air Quality had “reviewed and accepted” the Fugitive Dust Control Plan including the proposed air quality monitoring program. The record contains no evidence of any evaluation by the Utah Division of Air Quality of the content of the proposed air quality monitoring program.

Proposed factual findings 114 and 118 lack substantial evidence in the record to support them. Nothing in the record supports the assertion that the permit’s air quality monitoring program will collect “sufficient” data to evaluate the effectiveness of the fugitive dust control practices. The Division did not find that the monitoring plan submitted by Alton was sufficient. Instead, the Division explicitly deferred to an evaluation by the Utah Division of Air Quality that has not yet occurred. Excerpts of Rule 30(b)(6) Deposition of Priscilla Burton (Feb. 22, 2010) at 78, attached as Exh. 14 to *Petitioners Post-Hearing Brief Addressing Air Quality and Cultural/ Historic Issues* (May 12, 2010). (“Q. Do you have experience in evaluating monitoring protocol for fugitive dust? A. No, I don’t. And that’s my point in the finding. Q. So will it be, then, the division of air quality that evaluates the effectiveness of the fugitive dust control plan, including the monitoring protocol? A. Yes, I hope that that is the case.”). *See also* Hearing Transcript *In the Matter of Request for Agency Action and Board Review of the Division’s October 19, 2009, Approval of the Application of Alton Coal Development, LLC, to Conduct Surface Coal Mining and Reclamation Operations in Coal Hollow, Kane County, Utah*, (Volume I A.M. and P.M. Sessions, April 29, 2010) (hereafter “Hearing Transcript”), Testimony of Priscilla Burton at 105 ln 17 to 106 ln 3. Division staff Ms. Burton testified that the air quality review by DAQ had not yet occurred to the best of her knowledge. Hearing Transcript (April 29, 2010), Testimony of Priscilla Burton at 108 lns. 12-17.

balance (no indication of which specific part or parts of ACD's application constitute the required description or any part thereof).

7. Certain proposed findings of fact or conclusions of law are inconsistent with the Board's decision on the *de novo* scope of administrative review. Without limitation, these include:

- (a) proposed conclusion of law 48, which asserts that "Petitioners have failed to meet their burden of proving that the Division's approval of the permit with regard to this issue was **arbitrary or capricious** or in violation of Utah Code § 9-8-404" (emphasis supplied);
- (b) proposed conclusion of law 108, which asserts that the "Division's determination that it was not reasonable to expect impacts to cultural resources in the PHND from the mining operations **was not arbitrary or capricious**" (emphasis supplied); and
- (c) proposed conclusion of law 169, which asserts that "the Division's decision was **not arbitrary and capricious** because it has adequately explained its reasons for the choices made in its CHIA, and those reasons set forth a rational basis for the evaluation of potential material damage from the mining operations" (emphasis supplied).

8. The proposed findings of fact and conclusions of law are inconsistent with the Board's interim order and instructions to the Division, ACD, and Kane County with respect to at least the following issues:

- (a) the scope of the SHPO's concurrence in the evaluation of cultural resources;<sup>6</sup> and
- (b) whether the proposed mine's "adjacent area" includes the Panguitch National Historic District.<sup>7</sup>

---

<sup>6</sup> Pursuant to the interim order, the Division, ACD and Kane County were to prepare proposed Findings of Fact, Conclusions of Law and an Order "memorializing the decisions announced above." *Interim Order* at 27. The Board's Interim Order made no decision about the SHPO's concurrence. Consequently, the proposed findings related to the SHPO's concurrence are outside the scope of what the Board requested and should be rejected. The proposed Findings of Fact and Conclusions of Law are to implement the Board's decision not alter it.

<sup>7</sup> Proposed factual findings 98 and 99 do not serve to "memorialize" the Board's decision issued on August 3, 2010, related to the Panguitch National Historic District and should be rejected. The proposed findings of fact and conclusions of law put forward by ACD and the Division adopt a completely different rationale for resolving the Panguitch issue than the Board specified in its August 3 interim order. The Board concluded in its August 3 decision that "coal transportation truck traffic through Panguitch on US Highway 89 is not a 'coal mining and reclamation operation' as that term is defined in the regulations." *Interim Order* at 6. For this reason, the Board found that the Panguitch National Historic District "is not located within the mine's 'adjacent area' for cultural and

9. Certain proposed findings of fact are irrelevant or misleading with respect to the factual or legal issue to which they are ascribed. *See, e.g.*, proposed findings 155 (issue is whether the Division must adopt applicable water quality standards as material damage criteria, not whether the Division made the required finding using an unlawful standard), 174-77 (issue is whether ACD's application contains a description of how the monitoring data may be used, not whether the permit requires the collection, reporting, and interpretation of monitoring data).

10. The proposed findings of fact and conclusions of law pertinent to Petitioners' claim that the Division failed to evaluate and address the Coal Hollow mine's impacts on cultural/ historic resources for the entire permit area are incorrect in that they do not find as a matter of fact that Petitioners' Rule 30(b)(6) depositions of the Division and ACD exposed the agency's failure to complete an adequate review of the mine's impacts on cultural and historic resources as Petitioners' had alleged. The proposed findings of fact also wrongly fail to find as a matter of fact that following the depositions of the Division and ACD on the issue, they each took corrective action to address

---

historic resources." *Id.*

Contrary to proposed factual findings 98 and 99, the Board did not address the evidence of potential harm to the Panguitch National Historic District. Petitioners offered evidence that impacts to the Panguitch National Historic District could be "reasonably expected" from the Coal Hollow mine. *See e.g.*, Email from Donna Owens to Daron Haddock (May 22, 2008) [P-11]; Email from Becky Yard to Daron Haddock (May 13, 2008) [P-12]; Bobbi Bryant et al., Alton Coal Development (June 20, 2008) [pulled from D-1] (petition from 37 residents and business owners documenting concerns about potential impacts from truck traffic to Panguitch National Historic District). No evidence in the record contradicts Petitioners' evidence. Moreover, the Division did not analyze the concerns of Panguitch residents. Technical Memorandum from Joe Helfrich (May 29, 2008) [D-18], at 2 ("The Division will forward comments concerning the potential impacts to the town of Panguitch caused by the influx of coal truck traffic and to streams such as Mammoth and Assay creeks that intersect with the proposed transportation corridor to the Department of Transportation.") Instead, the Division took the position that it had no legal obligation and lacked the authority to address such concerns. Technical Analysis (October 15, 2009)[D-8] at 100. ("The Division received several comments about truck travel through Panguitch. Some people would prefer that the truck traffic be routed around the town, either by having applicant use 18 alternative routes, or by having -- have a bypass road 19 constructed. The Division does not regulate truck travel on public roads. The Division will forward the comments on to the Department of Transportation.")

their failure to cover the entire permit area. The proposed findings of fact wrongly omit that, in a meeting with Division staff in April 2010, ACD provided a cultural survey that had not previously been provided to the Division. *See Hearing Transcript* [Apr. 29, 2010] at 220 lines 11-13 (“MR. HADDOCK: What was communicated to us at the time was that there was a survey that had not been properly submitted to the Division.”). The same error exists with respect to the fact that this survey covered the missing 80 acres of the permit area and identified two additional sites that required a determination of eligibility and effect by the Division as well as concurrence by the SHPO. The proposed findings of fact are further deficient in that they do not recite that, upon receipt of this information, the Division promptly notified the SHPO that part of the permit area had not been covered in the previous analysis and identified two additional sites that would be adversely affected by the proposed mine, in a letter which acknowledged that 80 acres of the permit area had been left out of the cultural inventories previously submitted to the Division. *See Letter from Daron Haddock to Wilson Martin, State Historic Preservation Office* (April 21, 2010) [D-21]. Finally, the proposed findings of fact are inadequate because they fail to recite with sufficient specificity and support that the Division sent a letter to ACD adding a condition to the permit approval providing for the protection of the two additional sites that will be adversely affected by the mine. *See Letter from Dana Dean, Associate Director-Mining, to Chris McCourt, Alton Coal Development, Inc.* (April 20, 2010) [D-20].

11. The proposed findings of fact and conclusions of law that address Petitioners’ claim that the Division failed to evaluate and address the Coal Hollow mine’s impacts on cultural/ historic resources on 80 acres of the permit area are incorrect in that they do not conclude that the actions that the Division and ACD took during the pendency of this proceeding provided Petitioners with all the relief that the Board could have provided them and thus rendered the claim moot prior to

commencement of the evidentiary hearing. The Board's final order should dismiss Petitioners' claim as moot rather than erroneously rule on the merits.

### **The Limited Scope of Petitioners' Objections**

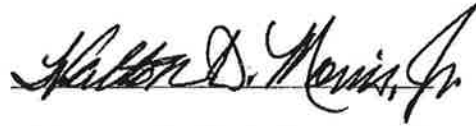
Petitioners interpret the Board's August 3, 2010, interim order announcing its decision to require only that they generally identify their objections to the proposed form of the final order, rather than identifying and researching every potential issue which that document may raise. *See Interim order* at 27 (providing, with respect to the proposed final order, time for Petitioners "to file objections to its form"). Except to provide certain of the examples described above, Petitioners do not believe that it is in the interest of the Board or the parties to repeat legal arguments and citations to the record already identified in Petitioners' post-hearing briefs. The limited time provided to Petitioners for the purpose of formulating objections, even as extended to accommodate counsel's responsibilities in other matters, reinforces Petitioners' understanding of the limited scope of the objections which the Board has invited. If Petitioners have misunderstood the interim order in this respect, they request that the Board so inform them and provide a reasonable period of additional time to formulate objections to the substantive nature of each proposed finding of fact or conclusion

of law that is erroneous or to formulate proposed findings of fact or conclusions of law that are missing from those that the Division and ACD have filed.

**Dated: October 14, 2010**

Respectfully submitted,

By:



Attorneys for Utah Chapter of the  
Sierra Club, *et al.*

Stephen H.M. Bloch #7813  
Tiffany Bartz #12324  
SOUTHERN UTAH WILDERNESS  
ALLIANCE  
425 East 100 South  
Salt Lake City, UT 84111  
Telephone: (801) 486-3161

Walton Morris *pro hac vice*  
MORRIS LAW OFFICE, P.C.  
1901 Pheasant Lane  
Charlottesville, VA 22901  
Telephone (434) 293-6616

Sharon Buccino *pro hac vice*  
NATURAL RESOURCES DEFENSE  
COUNCIL  
1200 New York Ave., NW, Suite 400  
Washington, DC 20005  
Telephone: (202) 289-6868

## CERTIFICATE OF SERVICE

I hereby certify that on the 14<sup>th</sup> day of October, 2010, I served a true and correct copy of **PETITIONERS' OBJECTIONS TO PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW** to each of the following persons via e-mail transmission:

Denise Drago, Esq.  
James P. Allen, Esq.  
Snell & Wilmer, LLP  
15 West South Temple, Suite 1200  
Salt Lake City, UT 84101  
[ddragoo@swlaw.com](mailto:ddragoo@swlaw.com)  
[jallen@swlaw.com](mailto:jallen@swlaw.com)

Bennett E. Bayer, Esq. (*Pro Hoc Vice*)  
Landrum & Shouse LLP  
106 West Vine Street, Suite 800  
Lexington, KY 40507  
[bbayer@landrumshouse.com](mailto:bbayer@landrumshouse.com)

Steven Alder, Esq.  
Utah Assistant Attorney General  
1594 West North Temple  
Salt Lake City, UT 84114  
[stevealder@utah.gov](mailto:stevealder@utah.gov)

Michael Johnson, Esq.  
Assistant Attorney General  
160 East 300 South, 5th Floor  
P.O. Box 140857  
Salt Lake City, UT 84114-0857  
[mikejohnson@utah.gov](mailto:mikejohnson@utah.gov)

Jim Scarth, Esq.  
Kane County Attorney  
76 North Main Street  
Kanab, UT 84741  
[mackeybridget@hotmail.com](mailto:mackeybridget@hotmail.com)

